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In The
Supreme Court of the United States

CAROL MORSOVILLO,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT OF NEVADA, CLARK COUNTY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Panel Decision of the Ninth Circuit conflicts with the United States Supreme Court holdings in *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998), *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993) ?

2. Whether the Panel Decision of the Ninth Circuit conflicts with the United States Supreme Court holding in *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133 (2000) regarding the appropriate standards of review of the granting of a Fed. R. Civ. P. 50 motion for judgment as a matter of law?

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STATEMENT OF THE CASE

Petitioner Carol Morsovillo ("Morsovillo") went to trial against Respondents, Eighth Judicial District Court ("Eighth JD") and Bill Ellis ("Ellis") on a hostile work environment claim based upon gender. At the close of Morsovillo's case, Respondents made a motion for a Fed. R. Civ. P. 50 Motion. The District Court granted the motion, and entered detailed reasoning into the record. (See Petitioner's Appendix ("PA")8a-22a.)

On Appeal, the Ninth Circuit affirmed the District Court's granting of a Rule 50 motion. *Morsovillo v. Chandler*, 262 Fed. Appx. 642 (9th Cir. 2008)(unpublished ruling) (*See* PA 1a-5a.) Both the Rule 50 Motion and appeal rested upon *Dominguez-Curry v. Nevada Transp. Dep't.*, 424 F.3d 1027, 1034 (9th Cir.2005). (See PA 1a-22a.)

THE UNDERLYING ALLEGATIONS

Morsovillo worked as a bailiff for the Eighth Judicial District Court under Supervising Bailiff Bill Ellis.[1] The case went to trial on primarily the hostile work environment claim, based upon gender. (PA 11a.) Petitioner Morsovillo's other claims for negligence, defamation, intentional or alternatively negligent infliction of emotional distress, and negligent supervision all stemmed from the hostile work environment claim. (PA 4a.) The District Court

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[1] All facts are from the Petitioner Morsovillo's Writ and limited appendix as no trial transcript was attached to Petitioner's Writ.

summed up the issues for trial based upon paragraph 17H of Morsovillo's Complaint where she alleged that: "On or about January 1995 Defendant Bill Ellis, lead bailiff at the time, made disparaging remarks against plaintiff, said remarks were based on sex or gender. Defendant Ellis has continued with his inappropriate conduct since that time directed against the plaintiff, and the Defendants have failed and/or refused to and/or neglected to stop the subject conduct." (PA 11a.)

REASONS FOR DENYING THE PETITION

Petitioner Morsovillo is attempting to create a constitutional issue where none exists. The Panel decision of the Ninth Circuit does not conflict with *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998), *Faragher v. Boca Raton*, 524 U.S. 775 (1998), or *Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993) as to the hostile work environment claim and/or the *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133 (2000), case as to the Rule 50 motion. Morsovillo, post-trial is attempting to re-color their claims in terms of whether members of one sex encountered disadvantageous terms or conditions of employment to which members of the other sex were not subject, but the re-coloring is irrelevant. (Petitioner's Brief ("PB") 23.) Viewing all of the evidence in a light most favorable to the Petitioner, there were no disadvantageous employment terms toward female employees. (PA 1a-22a.)

I. PETITION FOR CERTIORARI SHOULD BE DENIED AS MORSOVILLO FAILED TO ATTACH THE TRIAL TRANSCRIPT

The burden is on an appellant to provide a reviewing court with a record sufficient to permit meaningful review. *LaFollette v. Savage,* 63 F.3d 540, 544 (7th Cir. 1995); *Stookey v. Teller Training Distrib., Inc.,* 9 F.3d 631, 635 (7th Cir. 1993), *cert. denied,* 513 U.S. 839 (1994); *Woods v. Thieret,* 5 F.3d 244, 245 (7th Cir. 1993). The reason is clear: a reviewing court must have the means to apply the relevant law to the specific facts of the case appealed. When the absence of a transcript precludes meaningful review, a court either may "dismiss the appeal or decide [the case] on the merits to the extent it is practical and possible." *Fisher v. Krajewski,* 873 F.2d 1057, 1061 (7th Cir. 1989), *cert. denied,* 493 U.S. 1020 (1990).

Morsovillo drafted her questions in a purely law format, but the writ examines, in detail, trial testimony that lacks any trial transcript support. The absence of a transcript precludes a meaningful review by this court, and writ certiorari should be denied on this basis.

II. THE NINTH CIRCUIT'S RULING THAT ELLIS AND THE EIGHTH JUDICIAL DISTRICT COURT'S ACTIONS DID NOT CREATE A HOSTILE WORK ENVIRONMENT CLAIM WAS CORRECT AND THEREFORE THE WRIT DOES NOT WARRANT REVIEW BY THIS COURT

Morsovillo contests that the District Court and the Appellate Court misapplied the law for an action based upon gender discrimination, as the Courts relied upon *Dominguez-Curry v. Nevada Transp. Dep't.*, 424 F.3d 1027 (9th Cir. 2005). (PA 1a-22a.) The legal basis of *Dominguez-Curry* is as follows:

> To prevail on a hostile work environment sexual harassment claim, the plaintiff must show that her work environment was both subjectively and objectively hostile; that is, she must show that she perceived her work environment to be hostile, and that a reasonable person in her position would perceive it to be so. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 871-72 (9th Cir. 2001); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998). The plaintiff also must prove that "any harassment took place 'because of sex.'" *Nichols*, 256 F.3d at 872 (quoting *Oncale*, 523 U.S. at 79).
>
> In analyzing whether the alleged conduct created an objectively hostile work environment, we must assess all the circumstances, "including the frequency of the discriminatory conduct; its severity; whether it

> is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 270-71 (2001) (internal quotation marks and citation omitted). "'Simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998) (citation omitted). Here, we assess whether the workplace was objectively hostile from the perspective of a reasonable woman. *Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1464 (9th Cir. 1994).

Dominguez-Curry v. Nevada Transp. Dep't., 424 F.3d 1027, 1034 (9th Cir. 2005)

Morsovillo focuses her appeal on the following quote from *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75, 80, 118 S.Ct. 998, 1002 (1998) citing to *Harris, supra,* at 25 (GINSBURG, J., concurring): "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* At trial, Morsovillo presented no evidence that would meet this legal standard.

Morsovillo cites, in her Petition, to *E.E.O.C. v. National Educ. Ass'n, Alaska* 422 F.3d 840, 842 (C.A.9 Alaska 2005), in its support of *Oncale*. (holding "that offensive conduct that is not facially sex-specific

nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees."). (PB 27-28.)

In *E.E.O.C. v. National Educ. Ass'n, Alaska* the court found a triable issue of fact, and reversed a summary judgment for defendants. *Id.* at 843. In that case, three female employee plaintiffs presented evidence that a male supervisor, Thomas Harvey, repeatedly yelled at them, loudly and publicly, used foul language, made threatening physical gestures, and, in one instance, grabbed a plaintiff by the shoulders from behind. *Id.* at 843. "Harvey's behavior was not, on its face, sex- or gender-related." *Id.* at 844. The court summarized the issue as follows: "The main factual question is whether Harvey's treatment of women differed sufficiently in quality and quantity from his treatment of men to support a claim of sex-based discrimination." *Ibid.*

In *E.E.O.C. v. National Educ. Ass'n, Alaska,* the court held the "because of ... sex" element of the sexual harassment cause of action did not require defendant's behavior to be either "of a sexual nature" or motivated by "sexual animus." 422 F.3d at 845. Instead, the ultimate question was whether "'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" [Citation ommited] *Id.* at 844. There was evidence Harvey yelled at both male and female employees, but subjected female employees to more severe, more frequent, and more physically threatening abuse. *Id.* at 846.

The *Oncale / Alaska* framework notes that in order to constitute sexual harassment the actions need not be sexual, but rather that one gender suffered more than another. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998, 1002 (1998); *E.E.O.C. v. National Educ. Ass'n, Alaska,* 422 F.3d at 845. In Morsovillo's situation, the comments at issue, (i.e., use of the word "bitch") were gender specific and negative against women. Because of this, Morsovillo need not rely upon *Oncale / Alaska* framework for her claim. Therefore, the fact that the District Court and the 9th Circuit panel relied upon *Dominguez-Curry* instead of *Oncale* would not change the ruling of either court.

III. ELLIS' VERBAL COMMENTS DID NOT CREATE A HOSTILE WORK ENVIRONMENT

The evidence presented at trial by Morsovillo failed to meet the hostile work environment requirements under *Dominguez-Curry* or *Oncale*. The trial testimony reflects that the "bitch" comments were sporadic and isolated. (PB 4-20.) Morsovillo's alleged hostile work environment timeframe spans from 1995-2003, and the testimony presented at trial only had a few references to any hostile gender language. (PB 4-20.) Trial witnesses Perrone, Brown and Tamez testified that they heard the term "bitch" used by Ellis on occasion in referring to Morsovillo. (PB 7, 11, 12.) However, there was no testimony that derogatory gender terms were uttered on a frequent basis. (PB 4-20.) Morsovillo had sixteen (16) witnesses who worked in courthouse testify at trial, including herself. (PB 4-20.) Out of those sixteen witnesses, not one testified

that derogatory comments were made on a frequent or constant basis. (PB 4-20.)

Matthew Diamond, a bailiff, testified that Morsovillo complained to him regarding Ellis's scheduling of work and overtime. (PB 4-5.) Bailiff Ludwig Beline testified that on several occasions Morsovillo failed to get a lunch break. (PB 5-6.) Beline also testified that he heard Ellis complain once about having, "too many redheads working under him" referring to both Morsovillo and Patricia Perrone. (PB 5-6.) Bailiff Randy Ford testified that when he first started working under Ellis, Ellis stated that Morsovillo was a troublemaker. (PB 6-7.) Bailiff McNeal Brown testified that Ellis called Morsovillo a bitch on more than on occasion. (PB 7.) Bailiff Richard Tamez testified that on one occasion he heard Ellis call Morsovillo "a fat bitch" and on another occasion heard Ellis getting off the phone with Morsovillo and say "darn women or damn women." (PB 12-13.)

Family Division Administrator Christine Chandler testified that in 1995 Morsovillo came to her to complain that Ellis yelled at her at the front gate and told her to shut up in front of other people. (PB 8-10.) She further testified that, later that same year, Morsovillo came to her to complain that Ellis made comments about Morsovillo's weight, and that Chandler spoke to Ellis about his comments. (PB 8-10.) Patricia Perone testified that Ellis used profane language when referring to Morsovillo, that he used profane language frequently, and that Ellis referred to Morsovillo as a "bitch" on a number of occasions. (PB 11.)

Judge Gloria Sanchez testified that on several occasions Morsovillo came to her when she was upset. (PB 15-16.) Judge Steven Jones testified that Morsovillo came to him and stated that Ellis has used derogatory language about her, and that she was upset. (PB 16.)

Bill Ellis essentially denied Morsovillo's allegations in his testimony. (PB 14-15.) He denied telling other bailiffs to stay away from Morsovillo because she is trouble, and denied calling her fat. (PB 14-15.)

Morsovillo's husband Lawrence testified that his wife would come home from work extremely upset, and this caused marital problems. (PB 11.) Carol Morsovillo testified that in the summer of 1995 Ellis called her fat, yelled at her at the front gate, told her to shut up in front of the public, and referred to her as a bitch to other bailiffs. (PB 17-20.)

These are the facts, as presented by the Petitioner Morsovillo in her Writ. (PB 4-20.) While said facts may not appear pleasant, the above testimony did not meet the burden necessary to establish that a hostile work environment existed. The lower courts each agreed that Morsovillo failed to meet the burden of proving that a hostile work environment existed. (PA 1a-22a.) The findings of the courts were correct. *Id.* Under case law, the facts and circumstances in this case did not amount to a hostile work environment based upon gender. In reviewing the totality of the evidence adduced by Morsovillo in support of her hostile work environment claim, the lower courts reaffirmed that Title VII does not establish a "general

civility code" for the American workplace. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998).

A claim for sex discrimination based on hostile work environment under Title VII, requires a plaintiff to show that the workplace was "permeated with discriminatory intimidation, ridicule and insult," that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Mains v. II Morrow, Inc.*, 128 Or.App. 625, 634 (1994). Factual circumstances relevant to this showing include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* 510 U.S. at 23. Morsovillo failed to present any evidence that she suffered any harassment because of her sex.

The testimony of McNeil Brown, and Patricia Perrone indicates that on a few occasions Ellis referred to Morsovillo as a bitch but no evidence was presented that this was pervasive or constant. (PB 7, 11.) Richard Tamez stated he once heard Ellis call Morsovillo, "a fat bitch." (PB 12.) This testimony does not provide sufficient proof to support a claim of a hostile work environment. These patchy comments over a period from 1995-2003 do not create a hostile work environment. The "bitch" comments were not frequent, severe or abusive enough to interfere unreasonably with plaintiff's employment and therefore did not meet the requirements to create a hostile work environment.

The District Court correctly ruled that even if each of the Morsovillo's allegations of misconduct against Ellis is accepted, in the aggregate they do not rise to the level of severity or pervasiveness necessary to make out a claim for hostile environment sexual harassment. (PA 19a.) *See Harris,* 510 U.S. at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview."). The "severe or pervasive" standard is designed to exclude "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher,* 524 U.S. at 786.

Case law clearly supports the District Court's finding. Workplace harassment, even harassment between men and women, is not automatically discrimination because of sex "merely because the words used have sexual content or connotations." *Oncale,* 523 U.S. at 79. Rather, the plaintiff must always prove that the conduct at issue was "not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex." *Id.* See also *Candelore v. Clark County Sanitation Dist.,* 975 F.2d 588, 590 (9th Cir. 1992)(isolated incidents of sexual horseplay or inappropriate behavior not so egregious as to render work environment hostile); *Jordan v. Clark,* 847 F.2d 1368, 1374-75 (9th Cir. 1988)(off-color jokes told at work did not constitute abusive environment); *Benitez v. PGE,* 799 F. Supp. 1075, 1080-81 (D.Or. 1992)(sporadic comments or incidents of harassment, without more, will not support a hostile environment claim); *Kortan v.*

California Youth Auth., 217 F.3d 1104 (9th Cir. 2000) (although supervisor's sexually related comments about women were offensive, his conduct was not frequent, severe or abusive enough to interfere unreasonably with plaintiff's employment; offensive conduct was concentrated on one occasion, occurred in the wake of a dispute, and comments were about other people). Morsovillo's evidence regarding harassing language is sporadic at best, and as such, failed to create a hostile work environment that a reasonable woman would find offensive.

IV. MORSOVILLO FAILED TO PRESENT ANY EVIDENCE THAT MEMBERS OF ONE SEX WERE EXPOSED TO DISADVANTAGEOUS TERMS OF EMPLOYMENT

Morsovillo complained that she was not permitted to work as an acting supervisor. (PB 18.) Once Morsovillo told Ellis's supervisor, Chandler, that she was not permitted to work as an acting supervisor, the issue was addressed and Morsovillo was permitted to work as an acting supervisor. (PB 10.) The problem was corrected. (PB 10.) Again, such actions do not create a hostile work environment. There was a problem, Morsovillo informed management and it was corrected. (PB 10.) The Eighth JD did not ignore Morsovillo's issue, but rather corrected the same once it became aware of the problem. *Id.* Morsovillo testified that when she initially worked at Family Court, there was no female locker room, but that she was eventually provided a locker in a private coed bathroom. (PB 19.) Again, the problem was addressed and solved.

Morsovillo testified that between 1995 – 2003 that there were fifty (50) occasions when she was not permitted to take a lunch break. (PB 19.) The relevant time frame is from 1995-2003, which is an eight (8) year period. (PB 19.) Assuming she worked 50 weeks a year, and was permitted a two week vacation, she would have worked 2000 days total. (250 days per year times 8 years). Missing fifty (50) lunch breaks out of two-thousand (2000) is not indicative of any gender discrimination considering Morsovillo's job is that of a bailiff in a busy courthouse. Taking Morsovillo's undocumented claim of the missed lunch breaks, this still does not create a hostile work environment. Domestic Violence Commissioner Patricia Doniger testified that there were times when Morsovillo called the control room to obtain break relief, but no relief bailiff was provided, but this does not substantiate the fifty (50) missed breaks number. (PB 13.)

The fact that over an eight (8) year period Morsovillo believes she missed fifty (50) lunches is a random event, as it equates to only six (6) lunch breaks per year. This is not gender discrimination but rather a general staffing issue. No evidence was presented that only male bailiffs were permitted to eat lunch. (PB 4-20.) Morsovillo interprets the missed breaks as gender discrimination, but this was not substantiated at trial. (PB 4-20.) This does not support any inference that the genders were treated differently by Ellis or the Eighth JD.

At the trial, Morsovillo failed to present specific facts that proved there was conduct on the part of the Respondents that was constant and discriminatory

actions against her, or against women. The paucity of Morsovillo's specific incidents of such conduct failed to provide sufficient evidence that would "enable a reasonable trier of fact to conclude that discrimination has occurred" under either the *Oncale* or *Dominguez-Curry* reasoning. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 n. 5 (9th Cir. 2004).

The hostile work environment sexual harassment claim was properly dismissed through a Rule 50 motion. As the other claims all stemmed from the hostile work environment claim, the dismissal of other claims for negligence, defamation, intentional or alternatively negligent infliction of emotional distress, negligent supervision claim was appropriate as well. Therefore, the writ should not be granted.

V. THE PANEL DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE HOLDING IN REEVES V. SANDERSON PLUMBING PROD. INC., 530 U.S. 133 (2000)

In deciding Rule 50 Motions the Court must draw all reasonable inferences in favor of the non-moving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51 (2000)* [FN2]. The Court disregards all evidence favorable to the moving party that the jury would not be required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the non-moving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

The Rule 50 ruling was appropriate. The lower courts followed the *Reeves* standard. (PA 1a-22a.) The District Court's ruling on the Rule 50 Motion was clear and well laid out. (PA 9a- 22a.) The Order went into great detail regarding all of the claims, and the hostile work environment claim. (PA 9a-22a.) The 9th Circuit's Order was short and to the point, but affirmed the district court's ruling. (PA 1a-5a.) The lower courts did not make credibility determinations but rather legal determinations. (PA 1a-22a.) Both courts determined that Morsovillo failed to present sufficient evidence to permit a reasonable jury to find by a preponderance of the evidence that the Petitioner suffered a hostile work environment. (PA 1a-22a.) The lower courts looked at the totality of the circumstances and found that the conduct did not meet the legally sufficient evidentiary standard to permit a reasonable jury to find in favor of Morsovillo. (PA 1a-22a.)

The Rule 50 Motion was properly decided by the lower courts, and there is no reason for this court to grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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